In Re: ADM File No. 2015-27 - Proposed Minimum Standards for Appointed Counsel

Statement in Opposition to Proposed Indigent Defense Standard 4

To the Honorable Chief Justice and Justices of the Michigan Supreme Court:

The following is submitted pursuant to MCL 780.985(3) and Administrative Order No. 2016- XX, as public comment in opposition to the implementation of Proposed Indigent Defense Standard 4. It supplements an earlier memorandum submitted to the Michigan Indigent Defense Commission which is attached to this comment as an appendix.

I wish to reiterate at the outset my overall support of the mission of the MIDC "to ensure that indigent defense services in Michigan are delivered in a manner that is fair, **cost-effective** and constitutional." and my personal commitment to help to achieve those goals. I am also very grateful for the helpful and cordial informal discussions I have had with members of the commission and staff, particularly Jonathan Sacks and Christopher Dennie.

It is my contention that the proposed standard exceeds the authority established by the Michigan Indigent Defense Act by creating a new substantive right. Specifically, Standard 4 would require that a "limited appearance" attorney be provided by the court to appear with the defendant at arraignment. The limited appearance would be mandated and occur prior to a request for counsel by the defendant or a determination by the judge or magistrate that the defendant would qualify for court appointed counsel. The proposed standard imposes a requirement upon the court that has never previously been required by court rule or statute and has never been deemed to be a constitutional necessity. It is my further contention that the alleged Constitutional mandate for such a procedure is based upon an incorrect interpretation of existing case law by the MIDC involving a conflated interpretation of two separate concepts. These two distinct concepts relate to when, in the course of a criminal proceeding, the right to counsel attaches and when counsel must actually be present

The final version of that standard submitted to the Michigan Supreme Court for approval is not substantially changed from the originally proposed version which prompted my earlier memorandum. Additions to the staff comments and modifications of the "authority" sections submitted by the MIDC with the proposed Standard 4 compel me to supplement that earlier memorandum.

The results of the research incorporated into my earlier memorandum convince me that the right to automatic appointment of counsel prior to arraignment, as distinguished from the attachment of the right to counsel at the time of arraignment is not

required by the Michigan or US Constitution. I will not repeat the authorities cited in my earlier memorandum other than to restate the generally recognized principle that the right to the assistance of counsel at a court proceeding is triggered by the determination that the particular proceeding is a "critical stage" in the process.

In the prefatory comments to the proposed standard, the commission proposes a minimum standard of counsel "**at first appearance and other critical stages."** I have not received any response to my earlier memorandum which asserts that no authority has been found by me or cited by the MIDC holding that the initial appearance before the court for arraignment is such a critical stage. If the MIDC has found such authority it would easily dispose of my objection. That authority has not been included in the "Authority" submitted with the proposed standard. In the absence of citation to Michigan or US appellate authority holding that a first appearance is a "critical stage", the statement highlighted above merely begs the question. The same can be said for the staff comments which state, "**the proposed standard addresses an indigent defendant's right to counsel at every court appearance**…"

The "Authority" submitted to the Michigan Supreme Court with the proposed Standard 4 contains three changes from the original authorities section prepared by the MIDC for the earlier commentary period. It adds the US Supreme Court case of Lafler v Cooper, ___US___; 132 S Ct 1376;182 L Ed 2d 398(2012), adds and deletes statutory authority under the MIDC Act, and completely deletes MCR 6.005(A). As to the authorities contained in the earlier version that were retained in the final version submitted for comment, my position remains as stated in the earlier memorandum attached to the this statement.

The *Lafler* decision does not, in my view, address the Standard 4 issues raised in this objection in any significant way. The holding of that case is that ineffective assistance of counsel in the pre- trial plea negotiation process is not cured by a subsequent "fair trial" after a favorable plea agreement is rejected by a defendant relying on counsel's erroneous advice. It would appear self-evident that once counsel is provided that he or she must be competent in all aspects of the representation of the defendant. The case does not address the issue of when that appointment must occur.

Of course the right may attach earlier in the criminal investigation process in cases of custodial interrogation and perhaps in police line ups. However the procedures involved in arraignment, including the reading of the charge, advice of rights, determination of eligibility if appointed counsel is requested and the setting of pre-trial release conditions have not previously been deemed to mandate the appearance of counsel.

Notably, and I believe significantly, the" Authority" submitted by the MIDC with the final version redacts Michigan Court Rule 6.005. As I pointed out in my earlier

memorandum, that court rule does not stand as an authority in support of the proposed pre-arraignment appointment of counsel, but instead it is in direct conflict with it. An adoption of Standard 4 as presently written will necessarily require amendment of MCR 6.005. As I also suggested in my earlier memorandum, if there were to be such a drastic change in the appointment of counsel procedure, that it should be undertaken on the initiative of the Supreme Court as part of its regular rule making function and in recognition of the broader powers of this Court in its rule-making capacity.

The "Authority" citations accompanying proposed Standard 4 include MCL 780.991, Sections 1(c) 2(d) and 3(a). The sections of the Act originally cited by the MIDC as authority, but removed in the final version were Sections 2(a) and 3(d) of MCL 780. 991.

The removal of those earlier-cited "authority" sections of the statute by the MIDC appears to be deliberate inasmuch as the removed sections of the act evidence a legislative intent contrary to the proposed standard. Section 3(d) places responsibility on the defendant for "applying for indigent defense counsel" where Standard 4 would require the imposition of counsel prior to a request for appointment by the defendant. Section 2(a) contains a requirement of "sufficient time and space where attorney-client confidentiality is safeguarded." Proposed Standard 4's suggested use of a "limited appearance" attorney who, "in rare cases … has an opportunity for a confidential discussion," would defeat that expressed legislative intent both in terms of confidentiality and time limitations.

Section 2(d) is also included in the authorities section and relates to the requirement of vertical representation by counsel for indigent defendants. It is somewhat puzzling that this section would be included inasmuch as the staff comments accompanying Standard 4 expressly delay the implementation of the principle of vertical representation embodied in that section. Instead, the proposed standard carves out a "limited appearance" role for counsel that is contrary to that principle. What is most disturbing to me is the removal of the phrase "at every court appearance" language from its context within Section 2(d)'s vertical representation language and apparently suggesting that this is some kind of statutory mandate that counsel be assigned to appear at arraignment. This removal and quarantine of the phrase from its statutory context does violence to several recognized canons of statutory interpretation. It is statutory construction by eisegesis. (See: Scalia and Garner, Reading Law, The Interpretation of Legal Texts, Thompson/West, 2012) If MIDC is construing Section 2(d) as an intent by the legislature that representation must be provided at arraignment as a statutory mandate rather than a Constitutional one, it creates a disharmonious reading of the express provisions found in other parts of the act.

The legislative intent is, in my view, clearly expressed in the Michigan Indigent Defense Act. It provides a more limited role for the MIDC. Specifically, MCL780.985(3) tasks the MIDC with **proposing "minimum standards… that meet constitutional**

requirements for effective assistance of counsel." (Emphasis Supplied) Similarly, at MCL 780.991(1)(c), MIDC is required to **implement minimum standards ... as provided under amendment VI(of the US)... and Section 20 of article I of the state constitution."** The cited language makes it abundantly clear that the proposed standards are to based on minimum Constitutional standards and not upon perceived legislative policy. The language of MCL 780.983(b) and MCL 780.1003 provides further evidence that the legislature intended the standards to be based upon Constitutional requirements and not legislative policy.

If some substantial value could be shown or suggested by requiring the presence of appointed counsel at arraignment, then the expense, time and logistical issues addressed in my earlier memorandum to the MIDC could perhaps be justified I believe however that, assuming a competent and literate judge who is familiar with the current court rules, there is no adversarial aspect of the initial court appearance requiring appointed counsel at that proceeding. It is simply not a critical stage.

The portion of the staff commentary contemplating the role of this limited scope attorney indirectly admits as much. It appears be searching for relevant tasks for the arraignment attorney. While an **"explanation of the criminal justice process"** might be beneficial, I would argue that adequate explanations exist within the current court rule. If I were still representing indigent defendants, my **"advice of topics to discuss with the judge"** would be that there are no "discussion topics". I would tell the defendant that the judge will remind you of your right to remain silent and I suggest that you exercise it. There is of course no practical means of "discussing" the idea of **"achieving dispositions outside the criminal justice system"** with the judge at arraignment. I'm not certain exactly what is contemplated by the disposition outside the criminal justice system for someone to be arraigned on a felony, but the judge has no such power to "dispose" of the case and the presence of the prosecutor is unlikely.

I can also state from my experience of over 20 years as a court appointed attorney and my 13 years on the bench that a defendant generally does not require an appointed attorney to remind him or her to **"focus on the potential for pre-trial release."** While the concern of every defendant regarding pre-trial release is justifiably important, procedures are already in place to address that issue at arraignment. The existing court rules establish preference for a personal recognizance bond and require that a valid basis for a bond other than a PR bond must be stated by the arraigning magistrate. The rules further provide for the review of that decision no later than the probable cause conference. Thus, when counsel is appointed for qualifying defendants at the time of arraignment, one of the first tasks of appointed counsel would be to address the bond issue if necessary. The issue would be raised before the court no later than the probable cause conference or at a pre-trial conference in the less likely case where a misdemeanant is being held.

Candidly, if I were still practicing as appointed counsel, I would be very reluctant to serve as a "limited appearance attorney" and expose myself to potential liability or grievance claims based on an attorney-client relationship whose length would be measured in minutes. The issue of limited-scope representation was recently addressed by the American Bar Association's Standing Committee on Ethics in Formal Opinion 472 (November 30, 2015). Without going into a lengthy summary of that opinion, the problems presented by limited-scope counsel could complicate subsequent proceedings and communications. The opinion recommends that the exact nature of that limited scope representation be conveyed to the defendant in writing with presumably some kind of waiver then placed on the record as to that attorney's limited representation and the defendant's consent to that "limited appearance". It is unclear whether the MIDC considered any of those issues or studied that opinion when formulating the proposed standard.

Additionally, the right of a criminal defendant to represent himself or herself is a recognized Constitutional right. Where counsel has been involuntarily provided prior to arraignment the magistrate would presumably also be required to obtain a waiver of that right of self-representation before proceeding with arraignment.

In my view, it is of paramount importance that there is recognition of the distinction between what might be a procedural ideal and what is, in fact, a **"minimum constitutional requirement"**. In the case of proposed Standard 4, there is a failure to do so. The legislature is of course free to enact legislation to require the implementation of the procedures called for in Standard 4 as a matter of statutory policy rather than Constitutional mandate. The Michigan Supreme Court is free to do the same based upon its rule-making authority.

It is up to the judicial branch however, to decide whether or not to ratify the actions of the MIDC, and through this process determine the "minimum standards required by the Michigan or US Constitution. The submission of the proposed standards to the Michigan Supreme Court for approval is the only opportunity for the judiciary to be involved in the "delivery of indigent defense services." This Court may use this occasion as an opportunity to rather belatedly acknowledge that mandatory appearance of appointed counsel at arraignment has been required by the holding in *Rothgery* and the other cited cases and therefore that the current MCR 6.005 has failed to meet those minimum standards. Alternatively it may determine that neither the US or Michigan Constitution require the procedure contained in Standard 4 submitted by the MIDC.

In summary my position is essentially the same as expressed in the earlier memorandum submitted to the MIDC. It involves my belief that a proposed standard requiring the assignment of counsel to appear at the initial arraignment exceeds the

authority given to the MIDC by the legislature because it imposes a standard that goes beyond current minimum constitutional requirements.

Judge Fisher states in his submission letter to the Chief Justice as follows:

> Nothing in this Court's approval process creates a new, substantive right. The MIDC Act makes clear that the standards do not expand upon constitutional case law nor establish a basis for finding ineffective assistance of counsel, nor create a cause of action against the government. MCL 780.1003. Approving the standards allows for implementation of the legislature's intent to improve indigent defense delivery systems.

I agree with Judge Fisher that the approval process should not create a new substantive right. I disagree with the assertion that Proposed Standard 4 does not create such a new right.

I believe that there must be a commitment at the state and local level to provide additional resources and guidance in the delivery of indigent defense services. I believe that indigent defense counsel should be screened for competency, continuously trained, and paid reasonable compensation at an hourly rate without fee caps or other trial avoidance incentives. Appointed counsel must be given the resources he or she needs to meet and exceed the "minimum standards" of effective assistance. Meeting those standards will involve additional expenditures at the state and local level.

The stated mission of the Michigan Indigent Defense Commission specifically addresses the need for "**cost effective**" standards to address the constitutional requirements. Like the MIDC, I anticipate the submission of "creative and cost-effective compliance plans" pursuant to the Act. Those plans will reflect the unique circumstances of each jurisdiction with respect to facilities, staff, geography and technology. A specific plan that might be cost effective for one jurisdiction could produce the opposite result for another. Overall however, a procedure that is constitutionally unnecessary should be left to the discretion of the local governments as they develop their plans.

Respectfully submitted,

/s/ Bradley S Knoll

Bradley S. Knoll
58th District Court Judge
85 W 8th St Holland MI 49423

Appendix

To: Michigan Indigent Defense Commission

From: Bradley S. Knoll 58th District Court Judge

Re: Proposed Standard 4 – Counsel at First Appearance

Following a meeting with Jonathan Sacks at the Ottawa Circuit Court on August 19, I was invited to submit my questions and concerns to the Commission. I am grateful for the opportunity.

The comments that follow should not be construed as opposition to the mission of the Indigent Defense Commission. As a person who represented indigent defendants for over 20 years I recognize the need for a better approach. My perspective carries two sets of bias as both a sitting judge and former indigent defense counsel. I recognize that there may be a lack of objectivity here, which, I hope can be balanced by my broader experiences.

What follows is a summary of my reasons for opposing the implementation of MIDC Standard 4. It addresses two separate issues. The first is whether the proposed standard is mandated by existed statutes, court rules or case law. The second is whether, if not mandated, Standard 4 as presently written should be implemented.

The proposed standard reads as follows:

A. Counsel shall be assigned as soon as the defendant is determined to be eligible for indigent criminal defense services. **The indigency determination shall be made and counsel appointed and made available to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge. The representation includes, but is not limited to the arraignment on the complaint and warrant or the setting of a case specific interim bond while defendant is in custody.** Nothing in this paragraph shall prevent the defendant from making an informed waiver of counsel.

B. All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.

The troubling aspect of this proposed standard involves the two highlighted sentences in proposal 4.A. This language could be interpreted to require the court to determine indegency at the time an arrest warrant is sworn to if defendant is in custody and the court sets interim bond pending arraignment (setting of a case specific interim bond) and to *sua sponte* appoint counsel in all cases where defendant is held pending arraignment. It would also require that appointed counsel be "made available to provide

assistance …(at) the arraignment…" I believe this to be a significant departure from the arraignment procedure presently set forth in the statute and court rules.

I. Is the Counsel at First Appearance Standard 4 mandated by current statutes, court rules or case law?

The authorities cited in support of the proposed standard are as follows:

Authority:
Rothgery v. Gillespie County, 554 U.S. 191 (2008)
United States v. Cronic, 466 U.S. 648 (1984)
Powell v. Alabama, 287 U.S. 45 (1932)
US v. Morris, 470 F.3d 596 (CA6, 2006)
M.C.L. §780.991(1)(c), (2)(a), (3)(a, d)
Mich. Ct. R. 6.005(A)

Additionally, the "source" of the proposed standard is identified as *Principle 3 of the ABA Ten Principles of Public Defense Delivery System.*

The staff comments include the following language:
o *The proposed standard addresses* ***an indigent defendant's right to counsel at every court appearance***
o *One of several potential compliance plans for this standard will be an* ***on duty arraignment attorney*** *…*

I have reviewed the cited authorities and other authorities. My conclusion following that review is that these authorities do not require the participation of appointed counsel at the initial arraignment or at the time an interim bond is set prior to arraignment.

MCR 6.005(A) states:
(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant
(1) of entitlement to a lawyer's assistance **at all subsequent court proceedings**, and
(2) that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one.
The court must question the defendant to determine whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

The proposed standard is not mandated by the cited court rule, but rather is in direct conflict with it. The first inquiry by rule is whether the defendant wants a court-appointed attorney, i.e. asserts the right. Entitlement to the assistance of counsel**, if requested**, exists at all "**subsequent court proceedings."** Additionally, the indigency determination is made at the time of the arraignment pursuant to the rule. (See also MCR 6.104(E)). This language can be contrasted with MCR 6.907 (c) which expressly requires the presence of counsel at arraignment of juvenile offenders being charged as adults if the

parent or guardian is not present. Similarly, the Pretrial Release provisions in MCR 6.106 contain no language mandating counsel's presence at "… the defendant's first appearance before a court." It should also be noted that MCR 6.005(A) is inapplicable to misdemeanor offenses. (MCR 6.001(B), MCR 6.610(D)). Therefore, rather than being mandated by court rule, the implementation of Standard 4 would require substantial modification of the existing court rules.

The citied portions of MCL 780.991 provide as follows:

(1) The MIDC shall establish minimum standards, rules, and procedures to effectuate the following:

(c) Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, **shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services.**

(2) The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the assistance of counsel as provided under amendment VI of the constitution of the United States and section 20 of article I of the state constitution of 1963. In establishing minimum standards, rules, and procedures, the MIDC shall adhere to the following principles:

(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.

(3) The following requirements apply to the application for, and appointment of, indigent criminal defense services under this act:

(a) A preliminary inquiry regarding, and the determination of, the indigency of any defendant shall be made by the court not later than at the defendant's first appearance in court. The determination may be reviewed by the court at any other stage of the proceedings. In determining whether a defendant is entitled to the appointment of counsel, the court shall consider whether the defendant is indigent and the extent of his or her ability to pay. The court may consider such factors as income or funds from employment or any other source, including personal public assistance, to which the defendant is entitled, property owned by the defendant or in which he or she has an economic interest, outstanding obligations, the number and ages of the defendant's dependents, employment and job training history, and his or her level of education.

(d) **A defendant shall be responsible for applying for indigent defense counsel** and for establishing his or her indigency and eligibility for appointed counsel under this act. **Any oral or written statements made by the defendan**t in or for use in the criminal

proceeding and **material to the issue of his or her indigency shall be made under oath or an equivalent affirmation.**

I do not perceive a legislative intent in the cited sections that would require the appointment of an attorney prior to arraignment or mandating the appearance of an attorney at arraignment. In fact the legislative mandate closely tracks that language of MCR 6.005(A) and essentially does not require appointment of indigent counsel until it is requested by the defendant and the court's determination that he or she is eligible for the appointment. It is difficult to envision a procedure where a defendant could "apply for " and ""establish indigency and eligibility… under oath" prior to the arraignment. Nothing in the statute however, suggests that the court would be required to appoint counsel prior to that determination.

The question then naturally follows that, if not mandated by statute or court rule, is there some Constitutional deficiency in existing procedures which must be remedied by Standard 4? In attempting to answer this question I have found no cases distinguishing between the Sixth Amendment right to counsel and the same right established by the Michigan Constitution at Article 1, Section 20. (See People v Bladel , People v Jackson 421 Mich 39 (1984)).

The case primarily cited by proponents of Standard 4's implementation is the case of Rothgery v Gillespie County, 554 US 191 (2008). It has been suggested in informal discussions with MIDC members that the case represents the establishment of a new right or at least reflects a "trajectory" in the direction of requiring appointment of indigent counsel prior to arraignment and the presence of counsel at arraignment. I believe those statements misstate the holding in *Rothgery* .

Rothgery reaffirms the Court's prior ruling in Michigan v Jackson 475 US 625 (1986)

> "Once attachment occurs, the accused at least[15] is entitled to the presence of appointed counsel during any "critical stage" of the **postattachment** proceedings; what makes a stage critical is what shows the need for counsel's presence.[16] Thus, counsel must be appointed **within a reasonable time after attachment** to allow for adequate representation at any critical stage before trial, as well as at trial itself… As we said in *Jackson,* **"[t]he question whether arraignment signals the initiation of adversary judicial proceedings ... is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel**." 475 U.S., at 630, n. 3, 106 S.Ct. 1404. " (Rothgery, supra, p 2591, emphasis supplied). The latter question is not answered by Rothgery or any other case that I have found.

The case is hardly a departure from existing precedent. In fact the Court states:

> "Our holding is narrow...**We merely reaffirm what we have held before** and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger **attachmen**t of the Sixth Amendment right to counsel. Because the Fifth Circuit came to a different conclusion on this threshold issue, its judgment is vacated, and the case is remanded for further proceedings consistent with this opinion." p. 213 (emphasis supplied).

In my view, the importance of *Rothgery* for the purposes of this discussion is the point made above and in the concurring opinions stating which state that the majority opinion "correctly distinguishes between the time the right to counsel **attaches** and the circumstances under which **counsel must be provided**. " p. 2592 (emphasis supplied). The concurrence goes on to state:

> "Weaving together these strands of authority, I interpret the Sixth Amendment to require the appointment of counsel only after the defendant's prosecution has begun, and **then only as necessary to guarantee the defendant effective assistance at trial**. Cf. *McNeil,* 501 U.S., at 177–178, 111 S.Ct. 2204 ("The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to protec[t] **the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse positions of government and defendant have solidified with respect to a particular alleged crime" … Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial "critical stage," as necessary to guarantee effective assistance at trial. Cf. ("[C]ounsel must be appointed within a reasonable time **after *attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself*"** (emphasis in original).

The holding in *Rothgery* also"reaffirms" the earlier ruling in Brewer v Williams 430 US 387(1977). In Brewer the Court stated:

> "There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. See Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411; Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387. But its basic contours, which are identical in state and federal contexts, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer **at or after the time that** judicial proceedings have been initiated against him "whether by way of formal charge, preliminary hearing, indictment, information**, or arraignment**(citations omitted, emphasis supplied)

In *Jackson*, the US Supreme Court upheld the rulings of the Michigan Supreme Court. In that case it was held that the "**assertion** of the right to counsel" at arraignment established that right for 6th Amendment purposes even if the Defendant was not in custody. The Michigan Supreme Court in recognizing that the right "**attaches**" at arraignment held that "the defendant is entitled to counsel at all "**critical stages**" of the prosecution, i.e., those where counsel's absence might derogate from the accused's right to a fair trial" (citation omitted). Blaidel/Jackson 421 Mich 39,52 (1984). Thus it is the "critical stage" determination that triggers the right to the presence of counsel.

It must be noted that the US Supreme Court subsequently overturned its ruling in Jackson with respect to waiver of the right to counsel at post arraignment interrogation. *Montejo v. Louisiana*, **556 U.S. 778, (2009)** In doing so however it reaffirms the "critical stage" test, stating:

> "It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings." P 786.

It must also be noted that in that opinion the court specifically distinguished the Michigan procedure from that followed in Louisiana.

> "This rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it. **That is how the system works in Michigan**, for example, Mich. Ct. Rule 6.005(A) (2009), whose scheme produced the factual background for this Court's decision in *Michigan v. Jackson*.
>
> But many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency, *e.g.,* Kan. Stat. Ann. § 22–4503(c) (2007); and in *784 a number of others, appointment can be made either upon the defendant's request or *sua sponte* by the court, *e.g.,* Del.Code Ann., Tit. 29, § 4602(a) (2003)." *Montejo*, p 783-784 (emphasis supplied

Similarly the dissent states:

> "Unlike Michigan, Louisiana does not require a defendant to make a request in order to receive court-appointed counsel". Montejo, p 803

. It is clear from these cases that the initial arraignment has not been deemed to be a critical stage by any appellate rulings of this state or of the US Supreme Court. Additionally it has been expressly recognized by the US Supreme Court, without criticism of the process that Michigan requires a "request" for counsel before appointment.

From the foregoing I am convinced that the appearance of counsel with a defendant at the initial arraignment and before request is not required by court rule statute or case law interpreting the 6th Amendment. The determination by the staff in its comments that the arraignment is a "critical stage" is not supported by any case law.

II. If not mandated by statute, court rule or case law, should the Counsel at First Appearance Standard 4 be adopted?

I believe that answer to this question is "no". My concerns are both practical and theoretical. These concerns center on the process that would be used to comply with Standard Four in the context of arraigning persons incarcerated following arrest with or without a warrant. I don't have particular concerns where persons are arrested and released before arraignment by posting bond or charged without arrest on an appearance ticket. In those cases it would be a relatively simple task to have potential assigned counsel

scheduled to be present to meet with their client immediately **after** arraignment and appointment.

The assigned counsel on arraignment day practice has been used for decades in the 58th District Court locations in Hudsonville and Grand Haven. It was also used in Holland, but I have abandoned the practice. This decision was based on my perceptions as a court appointed counsel working in that system. I felt there was inadequate time to familiarize myself with the defendant or the case in order to engage in meaningful plea negotiations of give competent advice on the day of arraignment. There was an expressed level of mistrust by many defendants who saw it as a rush to enter a guilty plea. Many often mistook me for a member of the prosecutor's office. Ultimately the practice resulted in few resolutions, in part because the prosecutor had not consulted with law enforcement regarding potential plea offers or complied with the consultation requirements of the Victims Rights Act.

The greater problem lies in compliance with a standard requiring appointment before arraignment for those persons remaining incarcerated after arrest. The logistics of compliance with the proposed standard are daunting. The 58th District Court has four judges operating from three separate locations. When arraigning these people, each of the four judges in the 58th District Court arraigns assigned cases, usually by video link to the Ottawa County Jail or the lock up facility of the Holland Dept. of Public Safety. Sometimes arraignments are done in person and sometimes through video link up with the Dept. of Corrections. Persons seen include those arrested on outstanding bench or original warrants or those arrested without warrant for new offenses, probation or bond violations.

The task of providing for "on duty attorneys" at multiple locations or coordinating a centrally positioned attorney with multiple video/audio hookups while providing a means of confidential communication between the attorney and defendant would require major efforts and expenditures by the court and municipal and county corrections facilities.

I also have difficulty imagining a role for appointed counsel at the arraignment. It raises many questions. Does the attorney observe the process and kibitz the judge's compliance with the arraignment court rule and exercise of discretion regarding release? Is the attorney responsible for gathering and presenting the facts relevant to indigency determination or pre-trial release or does that remain part of the judicial function? Is defense counsel is allowed to make argument regarding those decisions? Must the court then also provide an on duty arraignment prosecutor or would the court only be hearing *ex parte* from defense counsel?

For whom would arraignment counsel appear? Would it be everybody, everybody who asked or everybody who asked and was determined indigent? What would be done with waivers of counsel and persons demanding to represent themselves? Who would entertain the request for appointment and make the indigency determination "under oath" prior to the arraignment? Would the "pre arraignment" be a recorded proceeding?

Would the court be required to provide multiple "on duty arraignment attorneys" in cases where there were co-defendants to be arraigned or are we to ignore MCR 6.005(F)?

Would representation of a defendant at arraignment prevent subsequent representation of a co- defendant? Would a conflict that would prevent representation in subsequent proceedings also prevent representation at arraignment? How would the "on duty arraignment attorney" determine the existence of that conflict?

On its face, the idea of a fifteen minute attorney-client relationship seems like a bad one. As an attorney, I would have serious reservations about accepting appointment as the "on duty arraignment attorney" because of ethical and liability concerns. The limited role of the temporary attorney, when coupled with limited opportunity and facilities to meet with the defendant would likely raise the same types of issues of attorney competency addressed in US v Cronic, 466 US 648(1984) and US v Morris 470 F.3d 596 (CA6, 2006).

Aside from the practical difficulties, the other basis for opposition to the proposed standard is largely theoretical. Candidly, I believe that the impetus for Standard 4 may be due to confusion as to the triggering events for the necessity of assistance of counsel between the 5th Amendment right (Miranda custody) and the 6th Amendment right (critical stage), "where the non-appearance of counsel would adversely affect the prospect of a fair trial." I have found no case law that holds that the arraignment procedure where the right "attaches" is a critical stage where "assistance" must be provided.

While certainly important, particularly to the defendant, the initial decision on pre-trial release does not impact the right to a fair trial. The court rule provides for an early review of the bond decision which frequently occurs at the probable cause conference or prelim on felonies and at the plea or pre- trial on misdemeanors. Of course the bond decision is also subject to review at any time in the process..

I have never had a situation where I have refused requests for court-appointed counsel for any reason other than on misdemeanors where I would not be imposing a jail term upon conviction. I think my experience is typical. I would recommend however that a procedure for review of refusals to appoint should be implemented either by mandatory interlocutory appeal or perhaps subject to review by the chief judge similar to the current procedure for refusals by judges to disqualify themselves.

If the proposed standard were to be implemented it would require substantial modification of the conflicting procedures forth in MCR 6.005(A) . It seems to me that such a change in procedure should be initiated by the Michigan Supreme Court as part of its rule making authority. At this point that court has not felt compelled to move in that direction in spite of regular and on- going rule changes. Even the most ardent critic of that court would be hard-pressed to argue that it is due to ignorance of or indifference to the cases cited.

I believe that the proposed standard goes beyond the mandate of the Michigan indigent defense commission act. As noted earlier, it conflicts with the express statutory provisions of Section 11. 2(d), 3(a) and 3(d). I agree that the act provides broad authority to the commission, but there is some limiting language. The mandate of the commission is to propose standards for the "effective assistance of counsel" for indigent defendants. MCL

780.985(3). The definition of "effective assistance of counsel" is limited to **compliance with standards established by state appellate courts and the US Supreme Court**. MCL 780.963(b). As argued earlier there are no Michigan appellate or US Supreme Court decisions that establish the requirement of the assistance of counsel at arraignment or prior to request in Michigan. Additionally, the language of MCL 780.1003 should be construed as a limitation on the power of the commission to "overrule, expand or extend" the existing case law.

The mandate of the commission is to develop standards that reflect existing case law rather than developing standards based upon perceived statutory policy or "trajectory" that change or expand it. As noted in *Montejo*, the legislature as well as the Court can provide for changes in the criminal procedures. There is no reason that the legislature cannot change the existing law to mandate the appointment of counsel without request or the presence of counsel at arraignment or that MCR 6.005 can't be changed by the Supreme Court to mandate the same. In my view, either of these alternatives would be the proper vehicle for implementing such a significant change to the law of criminal procedure in this state. I do not believe that the Indigent Defense Commission has the same authority.

I understand that the opinion of a district court judge is hardly the last word on substantive constitutional law or statutory interpretation. I further understand that the practical and logistical problems can be overcome if sufficient resources are devoted. The allocation of those resources to achieve compliance would be reflected in increased expenditures on behalf of indigent defendants. Since expenditure appears to be a primary evaluation rubric in assessing the quality of indigent defense, the increased expenditure for the on duty arraignment attorney would be a positive factor and move us up the list from 46th place.

I do agree that more money needs to be spent for indigent defense. The money should be spent on higher hourly rates for court-appointed counsel, without caps or other financial incentives to plead a case. The money should also be spent on adequate investigative or expert resources for court-appointed counsel and continuing legal education. Whether that increased funding is provided from state or local sources, it is ultimately a taxpayer burden. I think it would be money more wisely spent if it were applied to representation of indigent defendants at the traditional "critical stages" of the process rather than creating a new and unnecessary role contemplated by neither the statute nor case law.